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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CUONG MINH LE,

Defendant and Appellant.

B267422

(Los Angeles County  
Super. Ct. No. GA033230)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

In 1997, a jury convicted defendant and appellant Cuong Minh Le (defendant) of possession of a firearm by a felon and carrying a loaded firearm in public. Le had suffered two prior felony convictions within the meaning of the Three Strikes Law, and so the trial court sentenced him to a term of 25 years to life in prison. Fifteen years later, California voters passed Proposition 36, the Three Strikes Reform Act of 2012. Defendant filed a petition for recall of resentence pursuant to that Act, which the trial court denied because it found defendant had been armed with a firearm in the commission of the 1997 offenses, making him ineligible for resentencing. We are asked to decide whether the trial court erred in so ruling.

## I. BACKGROUND

The key facts of defendant's firearm possession charges are taken from our opinion in case number B119992.

On August 10, 1997, at 3 a.m., Alhambra Police Department Officer Eric Rivas responded to call regarding a possible fight at the Alhambra Garden Café. As he drove through the restaurant's parking lot, he heard a suspicious sound coming from the vicinity of a Lexus. Officer Rivas stopped his patrol car and asked a woman standing near the car what the sound was. Officer Rivas then saw a handgun on the ground near the Lexus. Officer Rivas took the woman by her arm and placed her over the hood of the car.

Defendant got out of the right rear door of the Lexus and began running away. As defendant ran, he kept his hand at his waistband. It appeared to Officer Rivas that there was something shoved into defendant's pants. Officer Eugene Ramirez apprehended defendant a short distance from the restaurant. Defendant did not have a weapon in his possession, but when officers retraced defendant's path, they found a fully loaded .357 magnum handgun on a nearby patio. Five .357 cartridges were found in the front seat area of the Lexus and one was found in the back seat.

On November 25, 1997, defendant was convicted and sentenced as described above.<sup>1</sup> Defendant entered prison and began serving his life sentence under the Three Strikes Law.

In March 2013, defendant filed a petition for recall of his sentence pursuant to Penal Code<sup>2</sup> section 1170.126, the statutory provision governing resentencing under Proposition 36. In September 2015, the trial court held a hearing on defendant's petition and found him ineligible for resentencing pursuant to section 1170.126, subdivision (e)(2) and section 667, subdivision (e)(2)(C)(iii) because "during the commission of the current offenses [defendant] was armed with a firearm."

## II. DISCUSSION

Defendant's sole contention on appeal is that the trial court erred in finding him ineligible for resentencing. The trial court's finding was based on section 667, subdivision (e)(2)(C)(iii), which bars resentencing if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." Defendant contends the trial court erred in finding that he was armed with a firearm within the meaning of subdivision (C)(iii) because that subdivision does not apply to convictions for firearm possession, which are defendant's only current convictions. Defendant maintains the factors listed in subdivision (C)(iii) must "attach to the current offense as an addition and not just be an element of the current offense." In defendant's view, being armed is an element of the offenses of possession of a firearm by a felon and carrying a loaded gun in

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<sup>1</sup> Specifically, the jury convicted defendant of possession of a firearm by a felon in violation of former Penal Code section 12021, subdivision (a)(1) and carrying a loaded firearm in violation of former Penal Code section 12031, subdivision (a)(1). The jury also found true the allegation that defendant had suffered two prior felony convictions within the meaning of the Three Strikes Law (Pen. Code, §§ 667, subds. (b) through (i), 1170.12).

<sup>2</sup> Further undesignated statutory references are to the Penal Code.

public. We agree with the numerous cases holding to the contrary, which have rejected arguments virtually identical to those defendant now makes.

A. *Applicable Law*

“On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12 and added section 1170.126 (hereafter the Act). The Act changes the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. (§§ 667, 1170.12.) The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)” (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

Section 1170.126, subdivision (e)(2) provides that an inmate is eligible for resentencing if the inmate’s current sentence “was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” Section 1170.12, subdivision (c)(2)(C)(iii) is identical to section 667, subdivision (e)(2)(C)(iii), cited by the trial court in this case and discussed briefly above. Both subdivisions apply when “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.”

(§§ 667 subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii) [collectively referred to hereafter as subdivision (C)(iii)].)

“‘[A]rmed with a firearm’ has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (E.g., § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [construing § 12022].)” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.) As the California Supreme Court explained in *Bland*, “[i]t is the availability—the ready access—of the weapon that constitutes arming.” [Citation.]” (*Bland, supra*, 10 Cal.4th at p. 997.)

Thus, numerous cases have held that subdivision (C)(iii) makes a defendant ineligible for resentencing under Proposition 36 if he was convicted of possession of a firearm by a felon and had the firearm readily available for use during the commission of that offense. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1030-1032; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048; *People v. White* (2014) 223 Cal.App.4th 512, 519.)

We review issues of statutory interpretation de novo. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.)

## *B. Analysis*

Defendant does not dispute that the trial court could consider the facts underlying his prior conviction, that those facts show he had the .357 magnum handgun readily available for use when he exited the Lexus, and that he continued to have access to the firearm as he carried it with him while fleeing police. He also does not dispute that these facts are sufficient to render him ineligible for resentencing under the holdings of *People v. Hicks, supra*, 231 Cal.App.4th 275, *People v. Brimmer, supra*, 230 Cal.App.4th 782, *People v. Elder, supra*, 227 Cal.App.4th 1308, *People v. Osuna, supra*, 225 Cal.App.4th 1020, *People v. Blakely, supra*, 225 Cal.App.4th 1042, and *People v. White, supra*, 223 Cal.App.4th 512. Defendant contends, however, that those cases wrongly decide a

defendant is armed in the commission of a firearm offense simply because the firearm is available for use. He urges us not to follow them.

Defendant argues that many of these cases ignore the “commission of” language of subdivision (C)(iii), which defendant contends requires the firearm to be available to aid or further the crime; in other words, he contends the availability of the firearm must have a “facilitative nexus” to the crime. This argument is often phrased as a requirement that the arming be “tethered” to a different underlying offense and used to facilitate the commission of that offense.

The cases do not ignore the “commission of” language, they simply reject defendant’s interpretation of it and find no “tethering” requirement. (See, e.g., *People v. Hicks*, *supra*, 231 Cal.App.4th at pp. 283-284 [facilitative nexus is required only for arming enhancements; subdivision (C)(iii) requires only a temporal nexus]; see also *People v. Brimmer*, *supra*, 230 Cal.App.4th at pp. 797-799; *People v. Elder*, *supra*, 227 Cal.App.4th at pp. 1312-1314; *People v. Osuna*, *supra*, 225 Cal.App.4th at pp. 1030-1032; *People v. Blakely*, *supra*, 225 Cal.App.4th at p. 1048; *People v. White*, *supra*, 223 Cal.App.4th at p. 519.) We agree with these cases in their rejection of defendant’s argument.

Defendant also asserts that finding a defendant who has been convicted of possession of a firearm by felon ineligible for resentencing under Proposition 36 is inconsistent with the purpose of that proposition. Defendant maintains, correctly, that the purpose of Proposition 36 was to shorten the sentences of less dangerous felons while ensuring that highly dangerous felons remained in prison, in large part by focusing on their current conviction(s). (See *People v. Johnson* (2015) 61 Cal.4th 674, 690-695.) Defendant asserts the electorate did not intend to exclude defendants convicted of possession of a firearm by a felon from resentencing absent an intent to use the firearm to facilitate another crime. As defendant acknowledges, the courts in *Brimmer* and *Elder* have expressly rejected this interpretation of the electorate’s intent. (*People v. Brimmer*, *supra*, 230 Cal.App.4th at p. 799; *People v. Elder*, *supra*, 227 Cal.App.4th at p. 1314.) We follow those cases and reject defendant’s argument as well.

DISPOSITION

The order is affirmed.

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BAKER, J.

We concur:

TURNER, P.J.

RAPHAEL, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.